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## A Proposed Cure for the Intervention Blues

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## A PROPOSED CURE FOR THE INTERVENTION BLUES

*Lawrence E. Hard\**

### I. Introduction

Under the type of hospital and medical payment protection plans provided by the various Blue Cross and Blue Shield programs, the subscribing member pays a yearly fee to the Services which, in return, agree to pay the member's hospital and medical expenses according to a contractual schedule. The contract does not guarantee full indemnification of the member for all his medical or hospital expenses. It is designed instead to pay the subscribing member a particular scheduled sum on the occurrence of certain contingent events such as hospitalization and necessary surgery. For this reason, and despite the fact that the scheduled benefits often completely compensate the member for his losses, courts have not regarded the Services as indemnity insurers.<sup>1</sup> Indeed, some courts have held that Blue Cross and Blue Shield are not insurance companies at all.<sup>2</sup>

Although this judicial distinction may be considered somewhat academic and anomalous,<sup>3</sup> it has rather serious consequences for the Services where the medical or hospital expenses of a member are the result of injuries negligently caused by a third party tort-feasor. In making payments to the member under the terms of the contract schedule, the Services make no distinction as to the source of the member's injuries; the cancer patient is paid under the same contract as the accident victim. Where the injuries have been caused by a negligent tort-feasor, however, the Services seek to recover their payments from the tort-feasor, or from the member if he has been compensated by the tort-feasor. In other words, the Services seek subrogation of the member's claim against the tort-feasor to the extent of their actual hospital and medical expenditures.

If the Services were recognized to be indemnity insurers, there would be no question that they would be entitled to subrogation against the

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<sup>1</sup> See Kimball & Davis, *The Extension of Insurance Subrogation*, 60 MICH. L. REV. 841 (1962).

<sup>2</sup> E.g., *Michigan Hosp. Serv. v. Sharpe*, 339 Mich. 357, 63 N.W.2d 638 (1954); *Michigan Medical Serv. v. Sharpe*, 339 Mich. 574, 64 N.W.2d 713 (1954).

<sup>3</sup> Kimball & Davis, *supra* note 1, at 868.

tort-feasor as a matter of equity.<sup>4</sup> Because of the characterization of the Services as something other than insurers, however, such equitable subrogation has been denied. In order to acquire subrogation rights, the Services have written contractual subrogation clauses into their agreements with subscribing members and, when necessary, have sought to enforce these contractual subrogation rights by intervening in actions by members against third party tort-feasors.

Even where the Services have written a subrogation clause into the contract, however, some courts have denied them the right to intervene. Nevertheless, the Services continue in their attempts to intervene in members' lawsuits against negligent third parties to protect their contractual rights to subrogation, while the members, and their attorneys, continue to oppose this practice.

Because of the persistence with which the Michigan Hospital Service (Blue Cross) and the Michigan Medical Service (Blue Shield) have attempted to intervene, and because of the conflicting responses of the lower courts of Michigan, this article will analyze the interests of the respective parties and the reasons for their adamant positions on the issue of intervention within the context of present Michigan law. It will also propose a statutory resolution of the problem.

This article does not purport to provide a study of the doctrine of subrogation and the merits of that doctrine in the context of insurance coverage. There are several difficult questions which could be raised as to the proper role of subrogation in insurance litigation.<sup>5</sup> This article assumes the propriety of extending the right of subrogation to the type of medical and hospital payment plans offered by the Services and analyses the device of intervention as a method of enforcing the Services' right to contractual subrogation.

## II. Attitudes of Parties Toward Intervention

The problem is by no means an infrequent occurrence in Michigan; since May 1965, the Services have attempted to intervene in "about ten

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<sup>4</sup> *Id.* at 841. Professor Kimball categorizes subrogation rights into two types, "legal" and "conventional". The former refers to those rights of subrogation which arise under the equitable principles of fairness and which exist independently of any express stipulation by the parties. "Conventional" subrogation, on the other hand, arises only because the parties have made a valid contractual agreement that one of the parties will be subrogated to the rights of the other if certain events come to pass. For purposes of clarity in this article the same conceptual distinction will be maintained, but the author prefers to use the term "equitable" rather than "legal" subrogation, and "contractual" rather than "conventional".

<sup>5</sup> Kimball & Davis, *supra* note 1. The authors conclude that thorough, well-documented empirical research might reveal that rather than expanding the use of the doctrine of subrogation in the area of insurance, particularly in the context of "conventional" subrogation, it might be socially and economically desirable to limit the use of subrogation principles.

cases" in the Wayne Circuit Court alone.<sup>6</sup> The issue arises under monotonously similar circumstances. Typically, a member is injured due to the apparent negligence of a third party. The Services pay the hospital and medical bills under the terms of the Blue Cross and Blue Shield certificates. The member then brings a personal injury action against the tort-feasor. The instigation of this lawsuit brings into operation certain rights described in the "subrogation clauses" found in the certificates of both Services.<sup>7</sup> It is the nature of these rights which is in dispute.

In the vast majority of cases, the enforcement of the rights under the subrogation clauses is a routine procedure whereby the parties agree on the nature of the rights and the allocation of the potential damage award between the member and the Services if the member is successful in his tort action. In general, these determinations are made by the member's attorney and the Subrogation Department of the Michigan Blue Cross-Blue Shield. Usually the determination is easily made since the hospital and medical bills are definite in amount. In the likely event that there is a settlement of the lawsuit, the process also proceeds with relative ease. The Services will agree to take an amount or percentage of the settlement figure.

In the event that the member refuses to acknowledge the subrogation rights of the Services, or refuses to give any assurance of recognition of

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<sup>6</sup> Letter from Charles R. Kinnaird, Jr., of the law firm of Long, Preston & Evans, Detroit, Michigan [house counsel to Michigan Blue Cross-Blue Shield] to Lawrence E. Hard, October 7, 1968 [hereinafter cited as *Kinnaird*].

<sup>7</sup> Blue Cross claims to have a contractual right of subrogation on the basis of the provisions found in Section IX(K) of the Michigan Hospital Service Certificate:

In the event any hospital service is provided or any payment is made therefor under this contract, the Service Association shall be subrogated and succeed to the rights of recovery of any member for such hospital service against any person or organization, except against insurers on policies of insurance issued to and in the name of such member. All sums recovered, by suit, settlement or otherwise, on account of such hospital service shall be paid over to the Service Association. Members shall take such action, furnish such information and assistance, and execute such assignments and other instruments as the Service Association may request to facilitate enforcement of the rights of the Service Association hereunder, and shall take no action prejudicing the rights and interests of the Service Association hereunder.

Blue Shield claims its rights to contractual subrogation under Section 6 of the Michigan Medical Service Certificate:

**SUBROGATION:** In the event of any payment for services under this certificate, Blue Shield shall be subrogated to all the member's rights of recovery therefor against any person or organization except against insurers on policies issued to and in the name of the subscriber, and the member shall execute and deliver such instruments and papers and do whatever else is necessary to secure such rights.

those rights with respect to the claims which are the subject of his suit the issue of enforcement of the contractual subrogation rights arises. Since 1963, the Services have had to commence over one hundred and seventy subrogation enforcement actions against members.<sup>8</sup> There are three basic methods by which such rights are enforced:<sup>9</sup>

1. The member and his attorney may be informed that future Blue Cross-Blue Shield benefits will be withheld until the issue of subrogation rights has been satisfactorily resolved.

2. A separate suit based on the contract may be instituted against the member to recover for the Services their proportionate share of the amount recovered by the member from the third party tort-feasor.

3. The Services may seek to intervene in the member's action against the negligent third party.

The first two methods have been effective in promoting out of court settlements in the majority of such cases. After expensive and time-consuming proceedings, pretrial procedures, motions, and "a certain amount of cathartic shouting and arm-waving",<sup>10</sup> the parties usually agree on a settlement.

To enforce their contractual subrogation rights in the remaining cases which are not resolved out of court, the Services almost always seek to intervene. Both the "pressure" method of intimidating the member to recognize the subrogation rights of the Services by threatening to refuse future coverage<sup>11</sup> and active prosecution of a direct suit against the member to collect the reimbursement fees are disfavored by the Services. Blue Cross and Blue Shield as large, quasi-public institutions are highly conscious of their public image.<sup>12</sup> Any such activities on their

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<sup>8</sup> Kinnaird.

<sup>9</sup> Long, *Subrogation Rights of Blue Cross-Blue Shield*, 43 MICH. S.B.J. 47 (August 1964).

<sup>10</sup> Kinnaird.

<sup>11</sup> See Silver, *Blue Cross and the Myth of the Sharpe Cases*, 43 MICH. S.B.J. 15 (November 1964). Mr. Silver includes in his discussion the following portions of a form notice used by the Services to inform the member that his hospital and medical protections have been suspended:

[Because of the provisions of the subrogation clauses], we have determined to withhold all future benefits under your Blue Cross-Blue Shield Subscriber Certificates, for all members covered thereby, until we have received subrogation payments due us, with respect to the above hospital admission, or satisfactory information indicating that no such payments are due. 43 MICH. S.B.J. at 15.

<sup>12</sup> Michigan Blue Cross and Blue Shield are voluntary non-profit periodic prepayment plans for hospital and medical service. They are separate corporations whose services are usually engaged simultaneously because of the complementary nature of their coverage. Special statutes provided for their incorporation in 1939 (MICH. COMP. L. §§550.301 to 550.316, and 550.501 to 550.517). They are not governed by the laws of Michigan "with respect to insurance corporations", but they are "subject to regulation and supervision by the commissioner of insurance". MICH. COMP. L. §§550.301, 550.501 (1948). In fact, both acts provide that the names of the two corporations shall not include the words "insurance, casualty, surety, health and

part would attract immediate attention, since at the present time about one out of every two people in the state of Michigan is a member of some Blue Cross-Blue Shield program.<sup>13</sup> It is clearly poor public relations to be involved in a large number of lawsuits, particularly against their own members. In addition, it is an unsavory practice to deprive members and their families of needed medical and hospital coverage, or even to threaten to do so. As a result, the Services have traditionally relied almost exclusively on intervention to enforce their rights under the contract when voluntary recognition by the members cannot be secured.

Attorneys for the member-plaintiffs are opposed to the intervention of the Services in the principal lawsuit.<sup>14</sup> They are primarily concerned about the possible adverse effects upon a jury verdict if it is known that Blue Cross and Blue Shield have already paid the hospital and medical expenses for the plaintiff. There is a fear that such knowledge on the part of the jury would offend the "collateral source rule" which protects the right of the plaintiff to claim amounts in tort actions for sums not actually expended or lost.<sup>15</sup> It is also felt that as a matter of litigation

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accident, mutual or other words descriptive of the insurance or surety business." MICH. COMP. L. §§550.303, 550.504 (1948).

The extent to which they are "public" rather than "private" institutions is demonstrated by various provisions of Michigan law:

Both Blue Cross and Blue Shield are characterized by statute as "charitable and benevolent" institutions exempt from taxation. MICH. COMP. L. §§550.315, 550.515 (1948).

The Boards of Directors of both corporations must contain representatives of the "public" as well as qualified medical personnel. MICH. COMP. L. §§550.308, 550.502 (1948).

Blue Shield is authorized to receive payments from governmental agencies "covering all or part of the cost of subscriptions to provide medical care for needy persons." MICH. COMP. L. §550.313 (1948). Blue Cross is also authorized to receive payments from the government for "persons in need of hospital care who cannot pay the cost of subscription." MICH. COMP. L. §550.510 (1948).

<sup>13</sup> Long, *supra* note 9, at 47.

<sup>14</sup> It is perhaps more accurate to say that the plaintiffs' bar is opposed to any type of reimbursement to the Services. They are opposed to intervention as a means of seeking such reimbursement. See Silver, *supra* note 11.

<sup>15</sup> The "collateral source rule" is so named because the defendant is not permitted to establish that the plaintiff did not actually sustain the amount of injury alleged, if diminution resulted from the resources of a "collateral source". As a result of the widespread acceptance of this rule (Alabama is the only state which does not recognize the "collateral source rule"), American courts have not permitted defendants to reduce damages by introducing evidence that plaintiffs have received proceeds from, among other sources, hospitalization insurance. *E.g.*, Conley v. Foster, 335 S.W.2d 904 (Ky. Ct. App. 1960). See generally Note, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741 (1964).

The "collateral source rule" is applied in Michigan. *Royer v. Eskovitz*, 358 Mich. 279, 283, 100 N.W.2d 306, 309 (1960).

For a general discussion of the "collateral source rule" and its particular application to hospitalization and medical insurance payments, see 22 AM. JUR. 2d, *Damages* §210 (1965).

tactics the jury may be less sympathetic toward the member's plight if it is known that he has not personally borne all the burdens resulting from his injury. Moreover, there is a possible conflict of interest problem for a plaintiff's attorney if he must represent both his client and the Services; his client wants to maximize his recovery, while the Services want to reserve part of that recovery for themselves. In addition, these attorneys feel that they can bargain with the Services, and perhaps pay a smaller amount out of any damage award to Blue Cross-Blue Shield, if the Services can be kept out of the principal action. There is more leverage for their bargaining position if it is known that the Services will not automatically become a party to the action.<sup>16</sup>

### III. Requirements for Intervention

The prior Michigan intervention statute allowed intervention by anyone "claiming an interest in the litigation", but only at the discretion of the court.<sup>17</sup> Intervention as of right was not available under that statute which contained no provision for a right to intervene comparable to Rule 209.1(3) of the Michigan General Court Rules of 1963:<sup>18</sup>

#### Rule 209. Intervention

1 Intervention of Right. Anyone shall be permitted to intervene in an action. . . (3) upon timely application when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant may be bound by a judgment in the action;

There are three conditions which must be shown by the Services before the court can allow intervention as of right:

1. that they have an interest in the matter being litigated in the main action;
2. that this interest may be inadequately represented by the plaintiff's counsel; and
3. that the Services may be bound by the judgment in the main action.

The right of the Services to intervene depends primarily on whether the Services have a sufficient interest in the member's lawsuit. The crucial dispute centers on the existence of such an interest, and as a result, very little has been decided by the courts as to the nature of the second and third conditions. Once a court finds that the prospective intervenor has no interest, it has to go no further, for it has demonstrated that there is no right to intervene. In at least one opinion, however, the

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<sup>16</sup> From interviews with plaintiffs' attorneys in Ann Arbor, Michigan during October 1968.

<sup>17</sup> MICH. COMP. L. §612.11 (1948).

<sup>18</sup> MICH. GEN. CT. R. 209.1(3) (1963). Rule 209.1(3) is based on Rule 24(a)(2) of the FED. R. CIV. P., adopted in 1938.

Wayne Circuit Court found that the latter two conditions were met by the Services.<sup>19</sup> Certainly, in a broad sense, the Services have some type of interest in the action brought by the member against the third party tort-feasor. They have already expended a certain amount of money in payment for hospital and medical expenses on behalf of the member. At the time when the member contracted with the Services to provide such coverage, he agreed to give to Blue Cross and Blue Shield certain rights contained in the subrogation clauses of both contracts. Basically, these provisions stipulate that in the event that the Services make hospital and medical payments on behalf of the member, he agrees that the Services "shall be subrogated" to any rights of recovery which the member might have against the tort-feasor.

The basic issue on which the Michigan lower courts have disagreed is whether this contractual subrogation stipulation, in and of itself, gives the Services sufficient interest to permit them to intervene as of right. At least one court, influenced by the liberal wording of Rule 209, has held that this contractual subrogation clause provides the Services with the requisite interest to allow their intervention as of right.<sup>20</sup> Taking a contrary approach, however, other courts have looked to additional language in the subrogation clauses to find that the Services do not acquire any rights of subrogation until the member has actually assigned his rights against the tort-feasor to the Services. If no assignment is made by the member, the Services can enforce the contract provision against the member only by bringing a separate lawsuit. According to this view, the right to enforce the contractual stipulation is not deemed sufficient to give the Services an interest in the principal action for purposes of intervention.

To a certain extent, the executory nature of the subrogation clauses which the Services have written into their contracts is responsible for the judicial confusion. Since the language of the subrogation clause is executory, some courts have understandably concluded that any right of subrogation provided by such clauses is not self-executing, but requires cooperative action on the part of the member before the Services can claim any rights by subrogation. Until the member performs in accordance with the provisions of the subrogation clauses, the Services have only an executory right to enforce subrogation, a right which these courts deem an insufficient interest to support intervention. Thus, it might be plausibly argued that the Services need only amend their subrogation clauses to make them self-executing in order to solve their problem of intervention.

The Services, however, have a perhaps compelling reason for avoiding self-executing language in their subrogation clauses. A self-executing

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<sup>19</sup> Opinion on Motions to Intervene, *Accuso v. Strickland*, Civil No. 19491 and *Wilhelm v. Conlin*, Civil No. 20154, (Cir. Ct., Wayne County, Mich. 1965).

<sup>20</sup> *Id.*



subrogation right is, in effect, an assignment of a claim, and under the Michigan General Court Rules of 1963, such an assignment makes the subrogee-assignee a necessary party to the action subject to the rules of compulsory joinder.<sup>21</sup> Such a result is not palatable to either the Services or to the plaintiffs' attorneys. The Services wish only to intervene in those few cases where the member refuses to recognize voluntarily their subrogation rights and the amount involved is worth the effort. They certainly do not want the expense and unnecessary burden of being a party to every lawsuit brought by a member against a tort-feasor. For their part, the plaintiffs' attorneys who have opposed even the most infrequent and sporadic presence of the Services by intervention would undoubtedly be even more strongly opposed to the necessary presence of the Services in every action. It would appear that the only possible beneficiary of such a situation would be the defendant tort-feasor who could compel the joinder of the Services as a simple delaying tactic and for the purpose of impressing the jury with the fact of the plaintiff's medical and hospital payments coverage.

In sum, the courts will not recognize the Services as indemnity insurers, entitled to equitable subrogation without the need for contractual subrogation by assignment of claims.<sup>22</sup> On the other hand, the Services do not want to write self-executing subrogation clauses into their contracts, for such clauses would probably subject them to compulsory joinder in every member's action since they would have acquired a direct cause of action against the tort-feasor. Thus, the Services are attempting to guarantee themselves the right to intervene selectively by writing a hybrid, executory subrogation clause into their certificates.

#### **IV. Judicial Treatment of the Services'**

##### **Attempts to Intervene**

The majority of Michigan courts are reluctant to grant the Services the opportunity to intervene at will, holding that the contractual clause which is intended to provide that option instead provides the grounds for denying it. These courts uniformly refer to two companion cases decided in 1954 in which the Michigan Supreme Court ruled on the nature of the subrogation rights acquired by Blue Cross-Blue Shield. Since these cases, rightly or wrongly, have had such a profound influence on the Michigan lower courts, and courts elsewhere,<sup>23</sup> resulting in the present state of confusion over the Services' right to intervene, they will be examined in some detail.

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<sup>21</sup> MICH. GEN. CT. R. 205 (1963).

<sup>22</sup> Kimball & Davis, *supra* note 1.

<sup>23</sup> *E.g.*, Hospital Serv. Corp. of Rhode Island v. The Pennsylvania Ins. Co., 227 A.2d 105 (R.I. 1967); Associated Hosp. Serv., Inc. v. Milwaukee Auto. Mut. Ins. Co., 33 Wis.2d 170, 147 N.W.2d 225 (1967).

### A. The Sharpe Cases

These two cases, *Michigan Hospital Service v. Sharpe*<sup>24</sup> and *Michigan Medical Service v. Sharpe*,<sup>25</sup> involved the same injured members and tort-feasors. Both actions arose out of an automobile accident in which the defendant Sharpe required hospitalization and medical care resulting from the negligence of the defendant tort-feasor. Sharpe made a claim against the tort-feasor which resulted in a settlement. The Services requested Sharpe to pay them out of the sum received from the tort-feasor at least part of the amounts expended by the Services for medical and hospital care. Sharpe refused to make any payment to either Service.

Blue Cross and Blue Shield then brought separate actions against both Sharpe and the tort-feasor to recover their respective expenditures. In the first *Sharpe* case, Blue Cross based its claim on the common law and equitable principles of subrogation and sought recovery from Sharpe of all sums received by him from the tort-feasor for hospital services furnished under the hospital care certificate. Blue Cross also claimed recovery from the tort-feasor for the cost and value of hospital services furnished to Sharpe and made necessary by the negligent and willful misconduct of the tort-feasor. In this first *Sharpe* decision, the court looked to the nature of the coverage plan provided by Blue Cross and concluded that it was not an insurance contract at all. Rather, the certificate stipulated that in the event that the member required hospitalization, the Service would be responsible for making all necessary payments:

There is no question that this service was purchased with the understanding that hospital care would be furnished the purchaser 'whenever needed.' . . . Plaintiff thus had a *primary obligation* to provide service in accordance with the terms of the contract. [Emphasis added].<sup>26</sup>

Thus, Blue Cross, not being an insurer, had no equitable right of subrogation. Moreover, since the Blue Cross certificate did not contain a subrogation clause, it lacked any contractual basis for recovery of its payment of the member's hospital expenses. In light of this "conclusive" omission, the court could find "not one iota of intent on the part of the plaintiff [Blue Cross] to recover for hospital services rendered."<sup>27</sup> The Service had neither an equitable nor contractual ground on which to base a subrogation recovery.

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<sup>24</sup> 339 Mich. 357, 63 N.W.2d 638 (1954).

<sup>25</sup> *Id.* at 574, 64 N.W.2d 713 (1954).

<sup>26</sup> *Id.* at 373, 64 N.W.2d at 641.

<sup>27</sup> *Id.* at 369-370, 64 N.W.2d at 639.

The second *Sharpe* case, unlike the first involved an express subrogation clause. Under the provisions of that clause, Blue Shield did have a valid claim to be subrogated:

Enrichment of plaintiff is not unjust if pursuant to the express agreement of the parties, fairly and honestly arrived at before hand. It is neither unjust, unfair nor inequitable to give effect to an agreement which was not induced by mistake, overreaching, fraud or misrepresentation. . . . To agree with defendants that the subrogation clause gave plaintiff no rights whatsoever is to read it out of the agreement by rendering it meaningless.<sup>28</sup>

However, the existence of such a contractual right of subrogation did not mean that the Service was automatically subrogated to the rights of the member defendant against the tort-feasor defendant:

Defendants Sharpe have failed and neglected to perform the assignment obligation. . . . As for the tort-feasor, . . . plaintiff's brief correctly states that 'liability cannot be cast on him by a contract to which he was not a party.' Defendants Sharpe have given plaintiff no assignment against the tort-feasor as provided in the certificate.<sup>29</sup>

In the absence of an actual assignment, the court concluded that the Service did not have a right of subrogation because it was not an "insurance company" within the meaning of Michigan insurance law.<sup>30</sup>

The second *Sharpe* case supports the conclusion that the Service can be subrogated to the rights of the member against the tort-feasor only if the member makes an actual assignment of his cause of action to the Service.<sup>31</sup> The Service is still entitled, however, to enforce its rights of subrogation under the contract by bringing a separate action against the member.

### *B. Subsequent Cases*

It is important to note that in neither *Sharpe* case was there reference to the doctrine of intervention. Instead, the court in both cases speci-

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<sup>28</sup> *Id.* at 577, 64 N.W.2d at 714.

<sup>29</sup> *Id.* at 577-578, 64 N.W.2d at 714.

<sup>30</sup> *Id.* at 578, 64 N.W.2d at 714.

<sup>31</sup> Such a conclusion does not contravene the common law doctrine that a cause of action for personal injuries is not assignable since the Services are only seeking to recover against the tort-feasor on the basis of their contract to provide hospital and medical care. Nor is it forbidden by the public policy which "forbids invasion of recoveries arising out of personal injury and loss of earning ability." Silver, *supra* note 11, at 16. The second *Sharpe* opinion makes it clear that such an assignment can be made without contravening public policy.

fically held that since neither Service was an "insurance company" it could not "claim the benefit of [former] CL 1948, §612.2 (Stat. Ann. §27,654) that permits insurers to *join* in actions against tort-feasors at law." [Emphasis added].<sup>32</sup> In other words, the Services could not be subrogated because they did not have a direct cause of action against the tort-feasor sufficient to permit them to be joined to the principal action. The essential concept was that of joinder, not intervention.<sup>33</sup> Nevertheless, various circuit courts have subsequently relied on the *Sharpe* decisions to deny the Services the right to intervene on the ground that there has not been an assignment of a cause of action by the member and that, therefore, the Services do not have a direct cause of action against the tort-feasor.

Perhaps the most articulate elaboration of this point of view was given by Judge Weideman of the Wayne Circuit Court in the case of *Hensley v. Gaffrey*.<sup>34</sup> In reference to the passage from the second *Sharpe* opinion which spoke of the necessity of making a direct assignment, Judge Weideman stated that:

In clear language, it has been established that *Blue Cross-Blue Shield did not acquire an independent right against the tort-feasor*. . . . Therefore, it is apparent that the applicants, without an assignment, have *no direct right against the tort-feasor* who injured their subscriber. [Emphasis in the original].<sup>35</sup>

On the basis of this lack of a direct cause of action, the judge found himself "compelled to conclude that Blue Cross-Blue Shield have no contract right (interest) upon which they can base their right to intervene."<sup>36</sup>

A similar opinion was expressed by seven judges of the Oakland Circuit Court in a decision consolidating four cases in which the Services sought to intervene.<sup>37</sup> The court found that:

This language [subrogation clause] merely creates a promise or obligation on the part of the subscribers to execute such assignments

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<sup>32</sup> 339 Mich. 357, 370-371, 63 N.W.2d, 638, 640; 339 Mich. 574, 578. 64 N.W.2d 713, 764.

<sup>33</sup> See note 41 *infra*.

<sup>34</sup> *Hensley v. Gaffrey*, Civil No. 24763, (Cir.Ct., Wayne County, Mich. 1965). Automobile negligence action brought by the member, *Hensley*, against the tort-feasor.

<sup>35</sup> *Id.* at 5.

<sup>36</sup> *Id.* at 6.

<sup>37</sup> *Sells v. Sutherland*, Civil No. 7441; *Miettunen v. Adams*, Civil No. 8821; *Brevoort v. Malone*, Civil No. 8904; and *Davis v. Ball*, Civil No. 9147, (Cir. Ct., Oakland County, Mich. 1965). Negligence cases in which all the plaintiffs sought to recover damages for personal injuries sustained.

*and does not give the insuring corporations any right or cause of action against the defendant tortfeasor unless and until the subscriber plaintiff executes such assignment of interest to the insuring corporation. [Emphasis added].*<sup>38</sup>

The Oakland court emphasized that the language of the subrogation clause was not self-executing, thus reiterating the position of the court in the second *Sharpe* case. In a rather unique treatment of the problem of intervention as of right, the Oakland court never referred to the basis for that right, Rule 209, thereby avoiding any interpretation of the meaning of "interest":

While the petitioners have the right to insist upon subrogation to the extent of payments made by them for and on behalf of the other plaintiffs, they do not have any cause of action against the respective defendants until they have obtained the assignment of the plaintiffs' claim to the extent required. An order may enter denying the petitioners the right to intervene in these respective causes.<sup>39</sup>

While the Oakland Circuit Court did not specifically cite the *Sharpe* cases, those judges would undoubtedly agree with Judge Weideman of the Wayne Circuit Court that:

Notwithstanding the fact that there has been a liberalization of rules regarding real parties in interest in Michigan since the *Sharpe* decisions were announced, there remains the decisive fact that there has been no assignment... which thereby renders inapplicable these new provisions.<sup>40</sup>

The "liberalization of rules" is a reference to the enactment of the Michigan General Court Rules in 1963. However, it would not appear that the new rules are "inapplicable." Insofar as there has been no assignment, the revised rules of joinder are certainly inapplicable to the present problem.<sup>41</sup> Yet it is precisely because there is no direct cause of

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<sup>38</sup> *Id.* at 2, 3.

<sup>39</sup> *Id.* at 3.

<sup>40</sup> *Hensley v. Gaffrey*, *supra* note 34, at 7. *See also* *Mierzwa v. Zielke*, Civil No. N 64-353, (Cir. Ct., Macomb County, Mich. 1964).

<sup>41</sup> The distinction between joinder and intervention is critical for the purposes of this analysis. Joinder is the procedure whereby either the plaintiff, the defendant, or the court requires the inclusion of a third party in the main action on the ground that the outside party has such an intimate connection with the main action that his interests

action against the tort-feasor that intervention is the appropriate procedure for Blue Cross-Blue Shield. Rule 209 allows a party to intervene in an action even where that party cannot be forced into the action under the rules of joinder.<sup>42</sup> Since the *Sharpe* cases were decided prior to the enactment of Rule 209 in 1963, and since in any event they were not addressed to the problem of intervention either by right or judicial discretion, reliance on the *Sharpe* cases to deny the Services the right to intervene in cases arising since 1963 is questionable.

Three members of the Wayne Circuit Court, in a decision rendered prior to Judge Weideman's decision in *Hensley*, found that Rule 209 did give the Services a right to intervene. Their opinion in the companion cases of *Accuso v. Strickland* and *Wilhelm v. Conlin*,<sup>43</sup> consolidating two automobile negligence cases in which Blue Cross and Blue Shield sought to intervene, is addressed directly to the problem of interpreting the meaning of "interest" in Rule 209.1(3). The *Accuso* court had little difficulty in settling the question of what constituted the "applicant's interest":

We may reason, therefore, only for the purpose of the pending motions, that the would-be intervenors have valid subrogation agreements which give them an economic stake in the outcome of the principal cases. . . . A person having an economic stake in the outcome of the main case would appear to be within the plain meaning of the words 'anyone' and 'applicant's interest'.<sup>44</sup>

The court found that the Services had an "economic stake" in the outcome of the main action because of their contractual rights of subrogation. None of the parties concerned denied the existence of the subrogation clauses, nor did any party attack those clauses as "illegal, invalid, or unenforceable."<sup>45</sup> After describing how the Services were

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must be adjudicated along with those of either the plaintiff or the defendant. This procedure is allowed primarily in the interest of eliminating multiple litigation over what is usually considered to be a single, interrelated transaction. See MICH. GEN. CT. R. 201, 205, 206, 207 (1963).

Intervention is the procedure whereby the third party can initiate his inclusion in the main action on the ground that he has an interest in the principal suit sufficient to put him on a level with the principal parties. Since he has volunteered himself as a "party", he must be willing to be bound by the judgment along with the principal parties. See MICH. GEN. CT. R. 209 (1963).

<sup>42</sup> See Note, *Recent Decisions—Procedure—Intervention—Blue Cross & Blue Shield Permitted to Intervene—Subrogation Rights Upheld in Negligent Injury Case*, 43 U. DET. L.J. 425, 426 n.8, 430 n.32 (1966).

<sup>43</sup> *Accuso v. Strickland*, Civil No. 19491, and *Wilhelm v. Conlin*, Civil No. 20154, (Cir. Ct., Wayne County, Mich. 1965) (automobile negligence cases brought by the members to recover for personal injuries).

<sup>44</sup> *Id.* at 4.

<sup>45</sup> *Id.* at 3.

entitled to reimbursement "out of such sums as plaintiffs may recover from defendants for medical and hospital expenses,"<sup>46</sup> the court concluded that "such an economic interest would be one within the meaning of the words 'applicant's interest' as used in Rule 209.1(3)."<sup>47</sup>

It would appear that the *Accuso* opinion represents a sound and sensible analysis of the purpose of Rule 209.1(3) and the correct application of that rule to the problem of the right of the Services to intervene. There is no basis in Michigan law for the requirement that an applicant for intervention have a direct cause of action against the third party tort-feasor.<sup>48</sup> Insofar as courts have interpreted Federal Rule of Civil Procedure 24(a) (2), the model for the Michigan rule, parties have been allowed to intervene if they have a substantial economic interest in the outcome of the action, with no requirement that they have a direct cause of action.<sup>49</sup> In addition, the general language of Rule 209.1(3)

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<sup>46</sup> *Id.* at 4.

<sup>47</sup> *Id.*

<sup>48</sup> In *Chandler v. Preston*, 207 Mich. 244, 174 N.W. 205 (1919), the principal suit was by a settlor against a trustee for accounting and removal. An attorney, who was by separate agreement entitled to part of the trustee's compensation, was permitted to intervene. In an earlier case, *McMillan v. School District No. 2*, 200 Mich. 280, 167 N.W. 48 (1918), the trustee in bankruptcy of a contractor sued the defendant school district for sums which the bankrupt claimed under a construction contract. The contractor's surety bondsmen were permitted to intervene on the grounds that they had a direct financial interest in the principal suit. Intervention was permitted where the bondsmen were merely general creditors with an interest in any recovery as well as where the bondsmen had rights of subrogation.

Other Michigan cases addressed to the same issue of the necessary interest to intervene are: *Detroit & N. Mich. Bldg. & Loan Assn., v. Oram*, 200 Mich. 485, 491-92, 167 N.W. 50, 54 (1918) (intervention allowed by executor of estate in action by mortgagor against remaindermen under the will); *Stratford Arms Hotel Co. v. General Cas. & Sur. Co.*, 249 Mich. 518, 229 N.W. 506 (1930) (principal on bond allowed to intervene and file plea in recoupment in suit brought directly against the surety on the bond); *Ford Motor Co. v. Blair*, 259 Mich. 574, 244 N.W. 167 (1932) (creditors who had brought garnishment proceedings against debtor contractor allowed to intervene in action brought by other creditors to reach a fund admittedly owed by garnishee corporation to debtor contractor).

<sup>49</sup> *Virginia Elec. & Power Co. v. Caroline Peanut Co.*, 186 F.2d 816 (4th Cir. 1951) (insurer allowed to intervene as of right under FED. R. Civ. P. 24 (a)(2) in action of insured against negligent third party to recover pro rata share of amount recovered); *Black v. Texas Employers Ins. Assn.*, 326 F.2d 603 (10th Cir. 1964) (workmen's compensation insurer allowed to intervene because of statutory subrogation rights); *In re McElrath*, 248 F.2d 612 (D.C. Cir. 1957) (interest in reputation is a sufficient interest for intervention as of right); cf. *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366 (1949) (subrogee insurance company is a real party in interest).

For other federal decisions where intervention of right was granted to applicants having a substantial economic interest in the outcome of litigation, but no direct cause of action, see *Ford Motor Co. v. Bisanz Bros.*, 249 F.2d 22 (8th Cir. 1957) (principal action brought by property owners to enjoin the operation of facilities owned by defendant railroad, manufacturer entitled to intervene as of right because of its vital economic interest in defendant's railroad service); *Northeast Clackamas C.E. Co-Op. v. Continental Cas. Co.*, 221 F.2d 332 (9th Cir. 1955) (contractor's claim against contractee involved issues similar to those of contractee's claim against the con-

indicates an intention to make the right of intervention more accessible to persons with various interests in the principal action. This broadening of the doctrine of intervention is consistent with the purpose of the revised Michigan General Court Rules to facilitate the speedy and inexpensive determination of legal issues.<sup>50</sup>

### V. Resolution of the Problem

Clearly the present dispute over the right of the Michigan Blue Cross-Blue Shield programs to intervene in actions brought by their members against third party tort-feasors should be resolved. The burden on the parties and the court system of struggling with an identical issue on numerous occasions is obvious. In addition to considerations of efficiency, both in time and money, there is also the goal of any rational and ordered legal system to provide a uniform application of its laws.

An alternative to the present system would be to have the Services take assignments on a mass basis, such as when a member enters a hospital for treatment. This procedure would certainly meet the requirements of those courts that insist on an actual assignment of the member's cause of action against the tort-feasor. However, to the extent that this method would result in the inclusion of the Services in every suit brought by members against negligent third parties, it would meet with the same objections from both the Services and the plaintiffs' attorneys that were discussed earlier with respect to having a self-executing subrogation clause in the contracts.<sup>51</sup> In addition to those disadvantages, such a system would be extremely cumbersome to operate. Equally important, the plan would be unlikely to meet with public approval, for the members would probably resent the presence of a self-interested insurance representative at a time of great anxiety for them. Indeed, there also exists the possibility that such assignments might not be enforceable because of duress. Since neither party is likely to be in favor of the assignment system, this alternative should not be considered a satisfactory solution to the present problem.

At least one commentator<sup>52</sup> has suggested that an alternative to the present system might lie in the hope that other courts would follow the example of the *Accuso* court by ordering intervention but subjecting any such intervention to "reasonable conditions protective of the rights of

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tractor's surety and contractor permitted to intervene in contractee's action against contractor's surety); *International Mortgage & Inv. Co. v. Von Clemm*, 301 F.2d 857 (2nd Cir. 1962) (after property of corporation was seized, shareholder allowed to intervene); *cf. Mack v. Passiac Natl. Bank & Trust Co.*, 150 F.2d 474 (3rd Cir. 1945); *Kozak v. Wells*, 278 F.2d 104 (8th Cir. 1960); *Strate v. Niagara Mach. & Tool Works*, 160 F. Supp. 296 (S.D.Ind. 1958); *United States v. C.M. Lane Lifeboat Co.*, 25 F. Supp. 410 (E.D.N.Y. 1938).

<sup>50</sup> See MICH. GEN. CT. R. 13 (1963).

<sup>51</sup> See text at 405-06 *supra*.

<sup>52</sup> See note 42 *supra*.



the plaintiffs.”<sup>53</sup> The advantage of such an order is that it respects the restrictions of the “collateral source rule.”<sup>54</sup> Basically, the order allows the Services to intervene but only sub silentio; they cannot be named as intervenors, nor can any reference be made by any party to their prior payments and other interests which they might have in the main action. The other main stipulation of the order is that the Services are entitled to a share in any judgment recovered against the defendant tort-feasor. This approach to the problem is appealing in its realistic balancing of interests and its provision of a method whereby both parties can protect their particular concerns in the outcome of the main action.

The difficulty with this suggestion is that it begs the crucial question of whether the Services have a right to intervene at all. Although the compromise inherent in such an order removes most of the objections which the plaintiffs’ attorneys have against intervention, and is acceptable to the Services, it cannot, in itself, create any rights. An order is merely a structuring of the remedy and presupposes the existence of a right to intervene. Since it is evident that some judges, despite Rule 209.1(3), are not persuaded that the Services have any right to intervene, it cannot be expected that such judges will allow intervention simply because, by framing such a conditional order, they could do so without offending the plaintiffs’ bar.

Still another option might be to amend Rule 209.1(3) to duplicate the 1966 amendments to the comparable Federal Rule of Civil Procedure 24(a)(2). The federal rule grants the right of intervention to persons claiming an interest the enforcement of which may “as a practical matter” be impaired by the outcome of the principal action. This might be a reasonable approach, consistent with the origin and purpose of the revised Michigan General Court Rules, were it not for the fact that the amendment might be subject to varied interpretations. The same Michigan courts which have interpreted the “applicant’s interest” to be synonymous with “direct cause of action” may find that intervention is not necessary “as a practical matter.” Consequently, the simple adoption of the language of Federal Rule 24(a)(2) in the Michigan General Court Rules might not achieve the desired result.

In order to obtain at least the semblance of consistency in Michigan courts regarding this issue, the most effective solution would be to include in Rule 209.1 an explicit provision directed at the particular relationship between Michigan Blue Cross-Blue Shield and the principal action. Such an amendment might read as follows:

209.1 (5) upon timely application, and subject  
to such conditions as the court may impose

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<sup>53</sup> Order of Intervention, *Accuso v. Strickland*, Civil No. 19491, and *Wilhelm v. Conlin*, Civil No. 20154, (Cir. Ct., Wayne County, Mich. 1965).

<sup>54</sup> See note 15 *supra*.

for protecting the interests of parties, when the applicant asserts a claim for reimbursement out of the judgment, based upon a prior written agreement with a party, on account of expenditures incurred for the benefit of such party in connection with the injury which is the subject of the principal action.

This type of amendment gives the Services no right of subrogation they did not already possess, but merely clarifies the procedural effect of such a right. As a result of this amendment, the Services will not be forced to initiate a separate lawsuit against a member in order to enforce a right to which the member agreed and which he cannot ultimately resist.

Although clear statutory recognition of the Services' right to intervene in members' lawsuits is certain to meet strenuous objection from the plaintiffs' bar,<sup>55</sup> it is submitted that the clear intent of Rule 209.1 (3) was to permit such intervention. Of course, once the Services are assured of their right to intervene, no reason can be seen why they would not be willing to accept such an order of intervention as was promulgated by the *Accuso* court.<sup>56</sup> By conditioning the Services' right to intervene on their agreement to remain invisible at the trial, such an order would satisfy the Services' desire to protect their interests, while also mollifying the desire of the plaintiffs' attorneys to shield the jury from any possible prejudice resulting from evidence of medical and hospital benefits already paid.

Finally, it is quite likely that even such a protective order will prove unnecessary, for it is possible that the most significant effect of an

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<sup>55</sup> If the current opposition to the claim of the Services for the right to intervene under existing law is any indication, a statutory guarantee of that right will be very strongly opposed.

<sup>56</sup> An order such as that issued by the *Accuso* court poses some procedural difficulties. Under the prior, wholly discretionary intervention rule, even a party with the most uncontested right to intervene might find that right subject to any number of discretionary conditions. One of the purposes of Rule 209.1 was to create the category of intervenor as of right and to give such intervenor all the participatory rights of an original party. The proposed amendment specifically authorizes the court to impose such conditions on intervention as are necessary to protect the parties. Without this proposed statutory authorization, it could be argued that such a conditioning of the right to intervention violates the purpose of Rule 209.1. See I J. HONIGMAN & C. HAWKINS, MICHIGAN GENERAL COURT—RULES ANNOTATED, Rule 209, Author's Comment 5 (1962).

The *Accuso* order also stipulates that if the Services and the member are unable to agree as to the allocation of the judgment, then the court may "require the jury to return a special verdict in the form of a special written finding upon the issue of what portion of the total amount of any verdict returned in favor of plaintiffs is attributable to" the services furnished by Blue Cross-Blue Shield. Under MICH. GEN. C. R. 514 (1963), the jury must return either a special or a general verdict; it cannot return both types of verdicts. This problem could very likely be easily overcome, for in the event that a party challenges this part of such an order on the grounds that it is contrary to Rule 514, alternative methods for determining the proper allocation of the damage award could be devised by the court.

amendment such as the one proposed will be practically to eliminate the use of the intervention rule altogether in cases where the Services are attempting to enforce their contractual rights of subrogation. The member, knowing that Blue Cross and Blue Shield have a right to intervene in his action against the tort-feasor, will probably be more willing to negotiate with the Services and settle the issue out of court. Such a lessening of the burden on the court system would be more beneficial to the already overextended litigation machinery than the actual use of such an amended Rule 209.1.